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Supreme Court of the United States

OCTOBER TERM, 1962

No. 490

JOHN L. BRADY, PETITIONER

vs.

MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MARYLAND

PETITION FOR CERTIORARI FILED APRIL 7, 1963
CERTIORARI GRANTED OCTOBER 8, 1963

Supreme Court of the United States

OCTOBER TERM, 1962

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

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IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1961

No. 135

JOHN L. BRADY, APPELLANT

v.

STATE OF MARYLAND, APPELLEE

APPEAL FROM THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY (O. BOWIE DUCKETT, Judge)

APPELLANT'S APPENDIX

(Filed August 23, 1961)

* * * *

[fol. 2] * * *

[fol. 3]

APPENDIX TO APPELLANT'S BRIEF NO. 135

IN THE CIRCUIT COURT
OF ANNE ARUNDEL COUNTY, MARYLAND

OPINION AND ORDER—April 7, 1961

In the early morning of June 28, 1958, John L. Brady and Charles D. Boblit robbed and brutally murdered William Brooks in Anne Arundel County.

Brady was tried first before Judges Michaelson and Evans and a jury. The jury found Brady guilty of murder in the first degree.

Boblit was subsequently tried by Judge Michaelson without a jury. He was also found guilty of murder in the first degree. Both Defendants received the death sentence. The two Defendants then appealed their convictions to the Court of Appeals of Maryland. The Appellate Court on September 24, 1959 affirmed the judgments of the Circuit Court (220 Md. 454).

On November 12, 1959, Brady filed a motion for a new trial in the Circuit Court which was denied on November 23rd by Judges Michaelson and Evans. On November 24, Brady filed a motion for reduction of sentence. Same was denied on December 8th and the matter again appealed to the Court of Appeals. On May 19, 1960, the Maryland Appellate Court dismissed the appeal but without prejudice to Brady to seek relief under the Post Conviction Act (222 Md. 442).

Brady's case is now before this Court on a Petition filed by his Attorneys on September 14, 1960 under the aforesaid Act, wherein a new trial is requested. It is the Petitioner's contention that his constitutional rights were violated because the State's Attorney neglected to advise Brady's Attorney of an unsigned statement of Boblit in which Boblit stated that he actually choked Brooks, although it was Brady's idea and that the crime was committed at Bradys' suggestion.

Both Defendants were represented by competent and experienced Attorneys in the Circuit Court and the Court [fol. 4] of Appeals. It is conceded that Brady is guilty of murder in the first degree, as the murder was committed in the perpetration of a robbery. However, Petitioner contends that if Boblit's unsigned statement had been available the jury which tried Brady may have added to its verdict the words "without capital punishment", and, therefore, that Brady was deprived of his constitutional right to due process.

Briefly, the pertinent parts of the Post Conviction Statute provide:

> "(a) Any person convicted of a crime and incarcerated under sentence of death or imprisonment, * * * who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, * * * or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus * * * may institute a proceeding * * * to set aside or correct the sentence, providing the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction * * * *".

While this Petition under the above Act for a new trial is filed only on behalf of Brady, I find it necessary to review the voluminous transcript in both cases because of the contention advanced by the Petitioner. It is readily apparent from the numerous conflicts, contradictions, changes and repudiations in the testimony and the several statements given by these Defendants, that neither had any conscientious scruples against committing perjury, and that each would give any statement or testimony which he considered beneficial to himself at the time.

It is also apparent from the evidence that Brady planned the crime (p. 114) and was the leader during the entire time. Brady had known Mr. ~~Broke~~ Brooks for fifteen years. Brady was familiar with the country where

[fol. 5] Brooks lived and where the body was hidden. Brady owned and drove the automobile which transported them to the Brooks farm. Brady hid the automobile. Brady obtained the shot gun. Brady purchased the pistol. Brady had the adhesive tape. It was Brady's idea to steal a fast car, namely, Brooks' (p. 117) for use in a contemplated bank robbery. Brady destroyed the evidence (p. 126).

As to Boblit, he had never seen Brooks before. He did not know the country. He had no car, no gun and no pistol until supplied by Brady. Being an unscrupulous moronic character, he was just willing to go along.

Brady's testimony at his trial was incredible. He first attempted to put all blame on Boblit by testifying that Boblit had choked Mr. Brooks while his (Brady's) back was turned (p. 108); later, that he would have done anything in the world to absolve Boblit (p. 112, p. 122).

As previously stated, a number of inconsistent statements were made by each Defendant. Briefly, the pertinent portions of these statements are as follows:

BRADY'S STATEMENT—MIAMI, FLORIDA—JULY 1, 1958

> "* * * About midnight we parked my car in the vicinity of William Brook's house * * * I told Donald Boblit to stay in the car and then I walked to about two hundred yards from Brook's house where I dragged a log across the road. After some time Brooks drove up in his * * * Ford. * * * When Brooks got out of car to remove the log from the road I hit him in the head from the rear with a piece of pipe about sixteen inches long and ½ inch in diameter. I knocked Brooks out and then I loaded him into the back seat and drove him to a spot near the Patuxent River south of Odenton, Md. I dumped Brooks out of the Car * * * I left him in the brush about fifty feet from the road. Then I drove back to my own car where Don Boblit was waiting. Boblit asked me where I got the car and I told him that I had borrowed it. * * * "

[fol. 6]

BRADY'S STATEMENT—MIAMI, FLORIDA—JULY 3, 1958

"* * * On the evening of June 27, 1958, Donald and I were again in my car in Odenton. I told him that we should steal a car to use in the bank robbery. I remembered that William Brooks, a man whom I have known for about 10 years, had recently got himself a new Ford automobile. I thought it would be fast and would be a good car to use in the robbery. I knew that he was working a night shift at National Plastics Company and would be arriving home in his car shortly after midnight. * * * I decided we had better leave Brooks in some isolated spot since we didn't know how bad he was hurt. * * *

"* * * As we were leading Brooks along into the woods Donald suddenly wrapped the red plaid shirt around Brooks' neck and threw him to the ground and began strangling him. Brooks was on his back and Donald was kneeling down beside his head twisting the sleeve of the shirt around Brooks' neck. I heard Brooks gasping and choking and knew that Donald was strangling him to death. I said nothing to Donald and did not try to stop him. I believe that Donald choked Brooks for about three minutes. We then felt his heart and found that it was not beating. We carried him on back into the brush another 25 to 30 feet, laid him on the ground and covered him over with brush in an effort to hide him. * * *

"* * * on the ride from where we had left Brooks to pick up my car, I removed the money from Brooks' billfold and threw the billfold in the Patuxent River.

"* * * I divided the money evenly between us and believe there was approximately $250.00. * * * I had decided that I would try to keep Donald out of trouble and, if caught, to take the full blame and say that he was not involved in any way. * * *

"On Sunday morning, June 29, 1958, I took Donald's red plaid shirt, the one with which he strangled Brooks, and because of the blood on it, burned it."

[fol. 7]

BRADY'S STATEMENT—JULY 9, 1958—FERNDALE POLICE STATION, MARYLAND

"* * * Donald suggested getting out in front of him when he pulled in the drive way in order to stop him. I told him no, we'll put a log across the road * * * So when he got out of the car, Donald was supposed to take him back behind the car because he would see me and I knew him. * * * I heard Donald hit him. * * * Donald and I put him in back of the car, on the floor. * * * On the way down their we decided we would have to kill him because he seen Donald. Going down to the river I told Donald to take the bill fold out of his pocket, and he did and layed it on the seat in front. * * * before we took him out of the car, Donald wanted to shot him, and I said no, for him to take and use his shirt. So then we took him out of the car and walked him about a 100 feet I guess, that's when we stopped, Donald put his shirt around his neck and threw him on the ground and choked him to death. * * *

Q. For what reason did you see Mr. Brooks that morning? A. I borrowed $2.00 from him.

Q. Was that * * * June 27, 1958? A. Yes, sir. * * *

Q. Why did you go to him to borrow $2.00? A. Because I knew of no one else I could borrow from. * * *

Q. When was the shirt taken out of the car to be used to strangle Mr. Brooks? A. When we took him out.

Q. Then you decided before he was taken out, to strangle him, is that correct? A. Yes. * * *

Q. What did you do while Donald choked Mr. Brooks to death? A. I just stood their.

Q. Did you at any time try to stop Donald from killing Mr. Brooks? A. No.

[fol. 8]

BOBLIT'S STATEMENT NO. 1 (PERTINENT PARTS)—
JULY 2, 1958

"I Charles Donald Boblit make this statement that on the 27 day to help Jhon B. to rob one WMB and take his body to the river brige and I sow Jhon B kill hin.

"I did not no that he was gorin to kill hin. Jhon B say that he was gorin to let hin stay a alive just knok WWB out and leve hin.

"this was about 12.30 or 1 Sat."

CHARLES DONALD BOBLIT

BOBLIT'S STATEMENT NO. 2 (PERTINENT PARTS)—
JULY 2, 1958

"* * * Q. Will you now, in your own words tell us of the events that led up to Williams Brooks being robbed and killed? A. Well, it was Friday the 27th, Brady told me he knew where we could get some money, he said that he knew this man William Brooks carried large sums of money and he knew where we could get a fast car. Brady told me how we could hold him up, by putting a log across the road, so when he saw the log he would have to stop. We rode up to the road that led to the man's house and we waited on the side of the road for him to come. We had put the log across the road and about five minutes later he came. He sat in the car for about two minutes, then he got out, bent down and picked the log up and put it off the side of the road. He started to get back in the car and then Brady hollered and told him to move away from the car or he would blow his brains out. The man walked to the back of the car, Brady told him to turn around and Brady took the barrel of the gun and hit him in the head with it. Brady and myself put him on the floor of the back seat of hi car.

Then we went down to where Brady took my shirt, twisted the sleeve and choked him. Then we took him into the woods, Brady broke branches and put [Vol. 9] them across his face. We come back and the lunch box was sitting right about where Brady choked him and then Brady threw the lunch box into the woods. * * *"

BOBLIT'S STATEMENT NO. 3—JULY 3, 1958

In this statement, Boblit merely confirms his two previous statements.

BOBLIT'S STATEMENT NO. 4 (PERTINENT PARTS)—JULY 5, 1958

"* * * Q. When was it decided by either you or Brady that Mr. Brooks would be killed? A. After Brady had hit him.

Q. Why did you and Brady decide to kill him? A. Because Brady knew him, and he thought he might have recognized Brady and myself.

Q. Did you and Brady discuss killing Mr. Brooks before he was killed? A. Yes sir.

Q. Where did this discussion take place? A. On the way down to where we found Mr. Brooks, Brady was going to shot him, that's what I thought he was going to do. He must have changed his mind on the way down, I guess he was afraid somebody would hear the shot.

Q. What was the conversation between you and Brady in regards to killing Mr. Brooks? A. Well, when we were up their on the road when Brady told Mr. Brooks to back away from the car, that's when Mr. Brooks turned around, that's when he must have got a look at Brady. Then Brady told him to turn around or he would blow his brains out with the shot gun. That's when Brady hit him with the gun. Mr. Brooks took and fell to the ground and he hollered two or three times; Oh you killed me. Then is when we put him in the car. Then we started up the road, then Brady said he would have to shot

him, I didn't say nothing I was to scared. Almost
[fol. 10] down their is when he must have changed his mind, cause he had my pink shirt in his hand when we walked him over to the edge of the woods.

Q. Then when you got to the woods, you had no intention of stopping Brady from killing Mr. Brooks is that correct? A. Well, I was thinking about it.

Q. But it was agreeable with both of you that Mr. Brooks had to be killed, is that correct? A. Yes sir."

BOBLIT'S STATEMENT NO. 5 (PERTINENT PARTS)—UNSIGNED—JULY 9, 1958

"* * * Q. Charles, since you gave your last statement to us, certain evidence has been uncovered that indicates that you might possibly have a few discrepancies in your previous statements. At this time we would like to ask you a few more questions to clear these up, is that satisfactory with you? A. Yes.

Q. In previous statements you have indicated that John Leo Brady struck Williams Brooks in the head with the shot gun, is that correct? A. Yes.

Q. We would like to ask you at this time if John Leo Brady struck Mr. Brooks with the shot gun or did you? A. I did.

Q. Did you strike Mr. Brooks with the shot gun on the drive way to his home which is located at Hidden Village, Quarterfield Rd., Severn, Md. A. I don't know if it is hidden village or not but it was near Quarterfield Rd.

Q. Where was John Leo Brady when you struck Mr. Brooks? A. Standing off on the side of the road.

Q. This took place on June 27, 1958 is that correct? A. That is correct.

Q. Do you know what time this took place? A. It was about 12:30 or 12:45 that night.

[fol. 11] Q. If it happened at 12:30 or 12:45 A.M. it would have been June 28, 1958, is that correct? A. That's correct.

Q. Also, after you and John Leo Brady took Mr. Brooks in his car to where his body was later found, you indicated in your previous statements that John Leo Brady strangled Mr. Brooks with your shirt, is that correct? A. That's what I told you, yes.

Q. Do you wish to change this part of your statement? A. Yes.

Q. What did occur at the scene of the strangulation? A. Well he had the gun until then, no I had the gun. I had the gun and the shirt. Then he took the gun from me, that was after I said I would have to shot him. Brady said no, lets strangle him. That's when I took and twisted my shirt sleeve and choked him. Then we carried him back into the woods.

Q. Why did you tell Brady that you would have to shot Mr. Brooks? A. Well that was right after Brady and I decided he would have to be killed.

Q. Did you know Mr. Brooks? A. No sir, I never saw him before in my life.

Q. Were you wearing the shirt, and take it off to strangle Mr. Brooks? A. No.

Q. Where was the shirt? A. Well when we were going down in the car the shirt was over the pistol.

Q. Where was the pistol? A. I had it in my hand.

Q. Did you choke Mr. Brooks while he was standing or did you knock him down and then choke him? A. I put the shirt around his neck while he was standing.

Q. Did you choke him until he fell or did you knock him down before you started choking him? A. I started choking him, he fell by himself.

Q. Charles, why didn't you tell us these things before? A. I don't know.

[fol. 12] Q. Charles, since you struck Mr. Brooks in the head and also strangled him, could it be possible that you planned to rob Mr. Brooks and not Brady? A. No sir, I didn't even know the man. It was his idea to hold him up and not mine and it was his idea to strangle him, I wanted to shot him.

Q. Is there anything else that is incorrect in your previous statements that you would like to correct at this time? A. Not as I know of.

Q. Is there anything else you would like to add to this statement? A. No.

Q. Is this statement true and correct to the best of your knowledge? A. It is.

Q. Will you sign this statement? A. Not before I see a lawyer.

Q. This entire statement of two pages will now be read to you, if it is correct will you answer by saying yes then if you car to, you may sign this statement is that understood? A. Yes.

Q. Is this statement the same as you answered us, or is their any errors that have been found while it was read to you? A. That's the way I gave it.

Q. Would you care to sign this statement? A. No."

The pertinent parts of Boblit's testimony at his trial on March 9, 1959 are as follows (p. 107):

"* * * Q. What happened then? A. Well we got out of the car and went around, opened the back door on the driver's side, opposite the driver's side, I did, and Brady got out and he opened the other side, on the driver's side, the back door. We took the man out. We took him out opposite the driver's side. I closed the doors. Brady had started to walk the man over towards the woods. He had gotten my pink shirt out, before I got around to the other side of the car. I was steadying the man, put my arm [fol. 13] underneath of him and he was walking by himself. We just put his arms around our neck. We alked him over there and we stopped at the edge the woods. It was a clearing there. We stopped there and then Brady, he handed me the pistol and I handed it back to him. He put it in his belt and he started twisting the sleeve up. I thought he was going to rip the shirt up, but he didn't. He put it around the man's neck and choked him.

Q. Where were you at this time? A. I was standing about from here to where the box is.

Q. Where those chairs are? A. To that box.

Q. While this happened did you do anything? A. I was too scared.

Q. Did you try to stop him? A. No, sir. I am no hero. I thought if he killed that man he would kill me too.

Q. (Court) What was that last you said? A. I said I wasn't no hero. If he killed that man he would kill me too.

Q. Well what made you think that Brady would kill you? A. I thought if he changed the plans on me like he did, and he killed that man what was to stop him from killing me. I was the only witness against him. * * *

(p. 109) Q. You saw Brady take your shirt and put it around the man's neck, is that correct? A. That's correct.

Q. And he twisted it? A. That is correct. * * * *"

(p. 132) Q. But you did discuss the necessity of killing him, didn't you? A. Yes, sir. It did come up.

Q. And wasn't there a conversation between you and Brady as to whether to shoot him or strangle him? A. I think there was,

Q. You know there was, don't you? A. There was.

[fol. 14] Q. And you wanted to shoot him, didn't you? A. Yeh, but Brady said strangle him.

Q. Brady said strangle him so you strangled him, right? A. I did not strangle him."

LAW

In determining whether there was a denial of due process in this case, several established principles of constitutional law are pertinent. Due process of law under the Fourteenth Amendment to the Federal Constitution is equivalent to "the law of the land" as used in the Maryland Declaration Of Rights, providing that no man ought to be deprived of his life, liberty or property but by the law of the land. 5 M.L.E., § 261.

An asserted denial of due process should be tested by an appraisal of the totality of facts in a given case. 5 M.L.E., § 262.

So we find the Supreme Court saying:

> "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances and in the light of other considerations, fall short of such denial." *Betts* v. *Brady*, 316 U.S. 455, 86 L. Ed. 1595.

Due process of law in a criminal case requires, in addition to (1) a legal offense, (2) a competent court, (3) an accusation in due form, (4) a notice and an opportunity to defend, a *fair* and *impartial* trial in conformity with the criminal procedure of the State where the case is tried. While the Fourteenth Amendment, providing that no state shall deprive any person of life, liberty or property without due process of law, requires that state action be consistent with fundamental principles of liberty and justice, it does not deprive the state courts of their control of *procedure* in criminal trials. 5 M.L.E., § 283.

[fol. 15] The question, therefore, is not whether the State's action in withholding Boblit's unsigned statement is improper but whether said action considered together with all the other facts and circumstances was so prejudicial as to constitute a denial of due process. *Application of Tune*, 230 F. 2d 883, Cert. denied 351 U.S. 987, 100 L. Ed. 1500.

It should also be understood that the law does not require in every criminal case that the prosecution reveal the availability of testimony inconsistent with the state's contentions. However, under special circumstances, such non-disclosures may amount to fundamental unfairness resulting in a denial of due process. *U.S.* v. *Dye*, 221 F. 2d 763, cert. denied 350 U.S. 875, 100 L. Ed. 773.

In light of the above, let us consider the facts and circumstances in the case at bar. Many of the circumstances were adduced in Petitioner's recent hearing before this Court under the Post Conviction Procedure Act. At

this hearing, the State's Attorney and the several attorneys who represented the Defendants testified in addition to the police officers and the Petitioner Brady. While there was a slight conflict in the testimony of Petitioner's Attorney, Mr. Woelfel, and Mr. Duvall, the State's Attorney, it may be assumed that the State's Attorney refused to disclose Boblit's unsigned statement to Mr. Woelfel and that same did not come to his attention until after the trial.

Under all the circumstances, this does not amount to a denial of due process for several reasons, viz:

1. It is a matter of procedure as to whether the State's Attorney is required to furnish Petitioner's Attorney, upon his informal request, a confession of a third party.

2. Boblit's statement, whether signed or unsigned, would not have been admissible in Brady's trial.[1]

[fol. 16] 3. The State's Attorney's failure to disclose this statement was immaterial as its non-disclosure was not fundamental in obtaining a fair trial or prejudicial to Petitioner.[2]

4. When all of the facts and circumstances concerning Brady are considered, as the law requires in this proceeding, it is apparent that the jury's verdict was not only proper and correct, but the only reasonable or responsible verdict under the circumstances.[3]

---

[1] *Donnelly* v. *U. S.*, 228 U.S. 243, 57 L. Ed. 820; *Munshower* v. *State*, 55 Md. 11, 71 A. 1063; *Brennan* v. *State*, 151 Md. 269, 134 A. 148.

[2] In considering this point, it must be realized that Boblit's statement did not absolve Brady but merely stated that Boblit was the one who actually twisted the shirt sleeve and choked the victim, although it was Brady's idea to strangle Brooks and they both carried him back into the woods. It should also be remembered that Boblit had previously made four other statements (signed) in which he said that Brady was the one who strangled Brooks; and moreover, at his trial, Boblit testified that Brady strangled Brooks and that his unsigned statement of July 9th was not true, (pgs. 108 and 109), *Application of Tune*, *supra*.

[3] From a perusal of the testimony and statements in the case, it would appear that Brooks would not have been killed except for Brady. Brady planned the robbery. He supplied the weapons. He was the leader and controlled Boblit's actions. Brady, although de-

5. More than a remote possibility or speculation is necessary to show a denial of due process.[4]

[fol. 17] For the above reasons, the Court concludes that the Petitioner is not entitled to relief under the Post Conviction Procedure Act, and the Petition is hereby dismissed.

O. BOWIE DUCKETT,
Judge.

April 7, 1961

---

nying that he had actually strangled Brooks, admitted it was done at his suggestion and in his presence. The latter is also set forth in Boblit's unsigned statement.

[4] It must be conceded that Boblit's unsigned statement was inadmissible at Brady's trial. Petitioner, however, contends that regardless of this, he was entitled to the statement before his trial on two grounds: (1) That he might have postponed his trial until after Boblit was tried and then called Boblit as a witness; (2) Another speculation advanced was that he could have called as witnesses the three police officers who took the statement.

As to the first point, testimony at his trial proved this to be most disastrous, as Boblit testified that Brady strangled Brooks and that his unsigned statement of July 9th "is not true". Furthermore, it is not a right of the Defendant to arrange the trial assignment but that of the State's Attorney and the Court's.

As to the second point, there is no showing that a careful investigation of the facts before trial or an interview with the police officers would not have disclosed the desired information.

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

TESTIMONY

LOUIS M. STRAUSS, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. Mr. Strauss, did you represent Charles Donald Boblit in a trial for murder in 1959? A. I did in association with Morris Turk, another member of the Anne Arundel County Bar.

* * * *

6. Now, in the course of preparation for that trial, did there come a time when you obtained from the prosecutor statements—extra judicial statements which had been made by your client to the police? A. Yes, I believe my associate, Mr. Turk, obtained those and we went over those together.

7. Do you know whether they were obtained from Mr. Duvall or from someone else? A. I have no independent knowledge but my assumption was that it came from the State's Attorney's office.

8. Did you ever tell Mr. Woelfel, at anytime prior to the trial, and conviction of John Brady, that your client, Boblit, had made a statement in which he, Boblit, admitted that he had hit Mr. Brooks on the head and had subsequently strangled him? A. No, I don't recall making such a statement.

[fol. 18] 9. Well, do you recall that you did not affirmatively recall that you did not give that information to Mr. Woelfel? A. To the best of my knowledge, I did not. I don't think I discussed Mr. Brady's defense with Mr. Woelfel at all except possibly the pre-trial conference in Judge Michaelson's office when the only issue involved was who was going to take the jury trial, whether they both would or whether one would take a court trial. I believe

Mr. Woelfel indicated he wanted a jury trial and Mr. Turk and I agreed that we wanted a court trial and the court trial would follow the jury trial of Mr. Brady.

* * * *

CROSS EXAMINATION

By Mr. Duvall:

* * * *

3. Now, who was at attendance at this pre-trial conference in Judge Michaelson's chambers, do you recall? A. I believe, to be perfectly frank I just had my memory refreshed last week, as I recall it the State's Attorney, Judge Michaelson, Mr. Woelfel, Mr. Turk and myself.

4. And do you recall in the course of the conversation with Judge Michaelson that Mr. Woelfel indicated he was electing a court—a jury trial because Brady claimed that he did not strangle the decedent and therefore it was the strategy that if he could persuade the jury to bring in a verdict of first degree murder without capital punishment Boblit would probably get the benefit of that in the court trial which you and Mr. Turk had chosen? A. I have no independent recollection of that. That apparently was running through my mind as far as Boblit was concerned.

* * * *

[fol. 19] MORRIS TURK, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. Did you represent Charles Donald Boblit in a trial for murder in 1959? A. Yes, I did in association with Louis M. Strauss, another member of the bar.

* * * *

5. Did there come a time when you obtained from the prosecutor, Mr. Duvall, or his office copies of extra judicial statements which had been made by your client? A. Yes.

6. Do you remember when you got those? A. No, I don't. I know it was before the Boblit trial.

7. Do you know if it was before the Brady trial which was in the early part of December, 1958? A. I don't recollect. If my memory serves me right, they were obtained before the Brady trial. I'm not definitely sure.

8. Do you remember how many statements there were? A. Four, if I remember.

9. Well, do you remember if they included a statement dated July 9, 1958 which is two pages long and I show you a copy of it and further identify it. It's a statement which Mr. Duvall offered at Boblit's trial but which the Court did not admit in evidence. Do you recall whether you had that statement which was dated July 9, 1958 prior to the Boblit trial? A. I remember that there was a statement which the State's attorney attempted to introduce which was not signed by Charles Donald Boblit and we objected and the Court sustained the objection and the statement was never entered into evidence at the Boblit trial.

10. Well, now do you remember if you had that particular statement prior to the trial? A. Yes.

[fol. 20] 11. And it was one of the ones that you got from the prosecutor? A. Yes.

12. Who did you obtain those from? A. My recollection is from the State's Attorney, Mr. Duvall.

13. Mr. Duvall. And you got all of the statements that you got did you get from him on one occasion? A. Yes.

14. And this occasion, to the best of your recollection now, was prior to the Brady trial in early December? A. Yes.

15. Now, did you prior to the trial of Brady and his conviction ever tell Mr. Woelfel of the existence of that statement of July 9, 1958? A. No, I did not.

16. Did you ever tell him of the substance of it? A. No, I did not.

17. Did you ever tell Brady of the substance of it? A. No, I did not.

18. Did you participate in this pre-trial conference in Judge Michaelson's chambers? A. Yes, I did.

19. And who else was present? A. To my best recollection was Mr. Duvall, Mr. Woelfel, Mr. Strauss, myself and Judge Michaelson.

(Mr. Bamberger) No further questions.

CROSS EXAMINATION

By Mr. Duvall:

1. Do you recall whether or not Mr. Woelfel at anytime prior to Brady's trial asked you what your client, Boblit, had told the State? A. No, he did not.

2. Now directing your attention to the pre-trial conference about which Mr. Bamberger asked you, do you recall a conversation during that conference in which counsel for Brady, namely Mr. Woelfel, indicated that his strategy would be to try Brady before a jury on the basis of Brady's denial that he had strangled the victim with the hope that he could persuade the jury to bring in a [fol. 21] verdict of murder in the first degree without capital punishment and the possible result of that verdict would be that Boblit would be treated in a similar fashion in his trial before the Court. The jury having tied the Court's hand's in Brady's case? A. I don't recollect the exact conversation as to verbiage. I know that that at least was our plan for Boblit to let Brady go first with the jury trial. And that whatever possible benefit Mr. Woelfel had with Brady before the jury we felt that would be to Boblit's benefit in our court trial. That I do remember.

* * * * *

8. Do you recall whether or not one of the purposes that you attended Brady's trial was to be present in the event that Mr. Woelfel called your client, Boblit, as a witness, to testify on behalf of Brady? A. No. The purpose of my attendance was to get the facts as was given under testimony at Brady's trial and then see what benefits we could derive for the defense of our client, Boblit.

9. Had there been any discussion between you and Mr. Woelfel about using Boblit to testify in Brady's trial? A. None that I recall.

BERNARD KIESSLING, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

• • • •

47. Now then officer, after July 5, isn't it true that on the 6th or the 7th you went to Florida with another officer and picked up John Brady and brought him back to Washington and went to Lynchburg, Virginia and then brought him back to Ferndale? A. That's correct, sir.

48. And as a result of some information that you obtained in the course of that trip, either from John Brady [fol.22] or otherwise, you thought it necessary to take a fifth statement from Boblit, didn't you? A. That's correct, sir.

49. And that statement was one which you took—which was taken in your presence on July 9, 1958, is that correct? A. Yes, sir.

50. And I show you a copy of it to refresh your recollection. A. I was present during this taking, yes, sir.

• • • •

63. Now, officer, you got some information—what was it that caused you to go back to Boblit on July 9 and take this fifth statement from him? A. Well, just prior to July 9th, we received certain information that prompted us to go back and talk to Boblit.

64. What was that information? A. Information we received was that Boblit actually was the one that struck Mr. Brooks over the head with the shotgun and he was actually the one that strangled Mr. Brooks at the final scene.

65. What was the source of that information? A. The source was the second defendant in this case.

66. You mean John Brady had told you that Boblit was the one who had hit Mr. Brooks on the head and strangled him, is that right? A. That's correct.

67. When had he told you this? A. I don't remember the date but he told us that at the time we brought him back from Miami.

• • • •

80. Well, would you tell me as much as you can remember of just what occurred when you went to talk with Boblit on July 9? A. About all that I can tell you that occurred was that he was taken to the office—detective bureau upstairs. Lt. Frye and I and Capt. Wellham was present and we advised him that we had heard certain discrepancies and asked him if he would be willing to give a statement or answer questions that we would type out in a statement form and which he did. And during the statement—at one time during the statement [fol. 23] he asked permission to go to the rest room and this was granted. He was accompanied to the rest room and brought back to finish the statement. At the completion of the statement he was asked if he would be willing to sign it and he refused to sign it stating that he would rather talk to an attorney first.

• • • •

87. Was Boblit told the source of the discrepancy? Was Boblit told that they had picked up Brady and Brady had accused Boblit? A. Boblit was not told that we had picked up Brady but Brady was in the cellblock at Ferndale and Boblit actually saw him there. We never advised Boblit that Brady had made any accusations whatsoever nor that he had made any statements to us in reference to his offense.

• • • •

90. Well then how is it that you did just get down to talking about the only two facts that had been contradicted? A. Well that was actually what we had in mind to clear up and as far as we knew we had nothing to discuss with him.

91. Did Boblit ever in any subsequent conversation with you, ever in your presence between the time the statement was taken and the time of the trial repudiate the confession in the statement of July 9th? A. I can't remember him doing that.

• • • •

114. Did you ever discuss with any of your fellow officers or anybody in the State's Attorney's office the relevance in Brady's trial—with the importance of

Brady's trial of this—Boblit's admission of July 9 that he had committed the crime?

(Mr. Duvall) Objection.

(Court) Sustained.

* * * * *

(Mr. Bamberger) Your Honor, may I be heard on that.

[fol. 24] (Court) Certainly you can be heard.

(Mr. Bamberger) Well, it seems to me, sir, that that's the important point that if the evidence, whatever it be, that if any officer had thought that that was important and had discussed it with his superior or with the prosecutor and had been told, well, it isn't important and that it's not they don't have any right to know it.

(Court) You mean Mr. Bamberger that it's the duty of the police department to go up to the defense attorney and tell him what his defense should be and give him any facts at all in the case.

(Mr. Bamberger) No, sir, but my first question was whether he had ever discussed it with any police officers or with anybody in the prosecutor's office and I say this because of the case on which I rely which was decided by the Third Circuit, that is just what happened. The policemen were discussing the existence of a—certain evidence. They were discussing with—one of them was discussing with his superior in the police department that the police had in their possession evidence which was helpful to the defendant in the trial and his superior said to him, "Well, alright you don't have to tell anybody about that".

(Court) Well, I always thought that the police certainly had no duty to advise or even contact the defense attorney. I think that—

(Mr. Bamberger) I agree sir.

(Court) I think that the whole line of trial is up to the State's Attorney.

(Mr. Bamberger) I agree but suppose that Sergeant Kiessling here said to one of his superiors, "Well, you know I think this statement of July 9th that Boblit made, that we ought to make sure that when Mr. Duvall is preparing Brady's case, Mr. Duvall knows that it is in Boblit's case because Mr. Duvall might want to decide

whether he has a duty to give it to Brady's attorney" and Sergeant Kiessling's superior might say, "well, you just [fol. 25] —you don't have to tell anybody that". Now, your Honor, this isn't saying—this is what happened in the Pennsylvania case.

* * * *

(Mr. Bamberger) Your Honor, just for the record I want to make it clear that my question is directed to asking Sergeant Kiessling whether he ever discussed with any fellow member of the police department or with any member of the prosecutor's staff the possible importance or relevance of Boblit's statement of July 9 in the trial of Brady.

(Mr. Duvall) I note an objection.

(Court) Sustain the objection.

By Mr. Bamberger:

117. Now officer, did you or anyone to your knowledge in the police department make up any summary of the evidence in these cases to give to the State's Attorney besides this initial letter that you talked about—original letter? A. Yes, sir, I know everything that we had in the case was given to the State's Attorney's office.

* * * *

GEORGE B. WOELFEL, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. And Mr. Woelfel you were counsel for John Brady when he was tried and convicted of this crime, is that correct, sir? A. I was.

3. And you are still counsel for him with me, is that correct, sir? A. That's correct.

4. When did you first know of the existence of this statement by Charles Donald Boblit to Capt. Wellham, [fol. 26] Sergeant Frye and Corp. Kiessling, that was the rank then, dated June 9, 1958, I show you a copy of it.

(Court) July 9?

By Mr. Bamberger:

5. July 9. That one was unsigned? A. Yes, sir, when you pointed out to me—

6. When was that in relation to the trial of Mr. Brady? A. I know it was several months afterwards, how many months I don't know.

7. When was it in relation to the affirmance of Mr. Brady's conviction by the Court of Appeals? A. It was after that.

8. Had you ever requested from the State's Attorney the copies of statements made by Boblit? A. Not in that phraseology. What I asked him for was—I asked him had he made any confessions.

9. You asked him who had made any confessions? A. Both of them.

10. You did? A. And he said "yes" and I said that I'd like to have them. And I sat in his office one day and he gave me—I imagine three or four on each side. It was about four pages each. And I read one day until my eyes got tired and heavy and had to come back and read another day and I finished reading the second day. But this one that was unsigned was not in it.

11. Well, did he give you all that were subsequently introduced at the trial of Brady? A. My recollection is that he did.

12. Do you remember how many—whether he gave you four or five which had been made by Boblit—Do you remember whether there were four of them or five? A. I wouldn't like to say. My recollection is about four—about four a piece they made but they were all signed.

* * * *

[fol. 27] (Court) What is the purpose of this Mr. Bamberger?

(Mr. Bamberger) Well, the purpose of this, Your Honor, is to show that in the four statements which were taken from Boblit from July 2 until July 5 he had told one story of the events which was inconsistent in some respect with other facts investigated by the police, other testimony at these trials and which was clearly inconsistent with the statements—number of statements that

Brady had given and then sometime between the fifth and the ninth the police became conscious of this inconsistency and took this statement of July 9.

(Court) Well, won't the State's Attorney stipulate that's a fact?

(Mr. Duvall) Yes, I'll stipulate that's a fact.

* * * *

By Mr. Bamberger:

13. Now, Mr. Woelfel, I refer to the statement of Donald Boblit dated July 9, 1958 offered and marked for identification as State's Exhibit No. 28 at his trial and I show you now the ribbon copy, the original of that statement, which was two pages long and not signed by Boblit but signed by Wellham, Frye, Kiessling, in whose presence it was apparently taken, and I ask you if when you asked Mr. Duvall for a--the statements made by the various defendants if he showed you that one? A. No, he did not.

(Court) Confessions—confessions, his testimony was he asked Mr. Duvall for the confessions.

(Mr. Bamberger) Yes, sir.

(Witness) No, sir I did not see that.

By Mr. Bamberger:

14. And you did ask him for the statement which had been made by Boblit as well as your client, Brady? A. I think the word I used was confessions. I think this would constitute a confession but that's a matter of opinion.

[fol. 28] (Mr. Duvall) That's a matter of opinion.

(Witness) Although, I didn't ask him for statements I asked him for confessions.

By Mr. Bamberger:

15. And he showed you four other statements or confessions which had been made by Boblit, is that correct sir? A. About four, I think made by Brady, three or four —about eight of them. It took me two days to read them all.

16. I just want to make sure the record is clear that he did show you the other statements that had been made by Boblit? A. That's correct.

17. Do you remember when this took place? When these were shown to you? A. It was before the trial, what date I couldn't positively recollect.

18. And where was it? A. In the State's Attorney's office.

19. Who was present? A. I think it was the State's Attorney and, I think, Mr. Johnson was there too. It was just the State's Attorney and myself and some lady, I don't know who she was.

20. Was your request for these confessions or statements addressed to Mr. Duvall or to someone else in his office? A. Oh, no, Mr. Duvall was there. The question was made to him and I recall he said take them out because they had so many and so thick I wanted to take them home and was—

21. And was that request— A. No, I read them right there—I read them there all I could read in one day and came back the following day and read the rest of them.

22. Did you ever make that request in writing? A. No, sir.

23. Now, do you remember participating in a conference prior to Brady's trial in Judge Michaelson's office? A. Yes, sir.

[fol. 29] 24. Who was present then, sir? A. It was Judge Michaelson, Mr. Strauss, Mr. Turk, Mr. Duvall, myself. I think that was all, I don't think the Assistant State's Attorney was there that day.

25. What was discussed at that conference? A. Quite a number of things. What day we wanted to go to trial and how we elected trial and I recall I stated that in view of the fact that they took a jury trial I wanted mine first. And that the case would be limited to penalty for murder in the first degree.

26. Well, why would it be limited to that penalty, sir? A. Because there was absolutely no justification or reason or rhythm or rhyme for killing a man and both of them were, at least, engaged in robbery or larceny, which is a felony, and understanding of law if both of them involved in a felony—

(Mr. Duvall) I object to Mr. Woelfel explaining on the law. We know he's skilled in that but I don't think it is proper.

(Court) Overruled.

(Witness) And both of them were in the act of committing a felony they were charged each with a greater offense and one of them committing murder, which ever one of them it was, would be—would automatically charge the other one with murder.

By Mr. Bamberger:

27. Was there any discussion then of the fact that your principal defense of Brady was going to be based on the issue that he was not the one who struck Brooks on the head or strangled him? A. Yes, that was the only defense he could make as far as I could see.

28. Well, was that discussed at this conference before Judge Michaelson? A. Well, it probably was—it had to be.

29. Now, did either Mr. Turk or Mr. Strauss ever tell you prior to Brady's trial of the existence of that statement by Boblit of July 9? A. No, Mr. Strauss nor Mr. [fol. 30] Turk, admittedly didn't show it to me, as a matter of fact, I had a conference with them one day—twice—and tried to get them to get Boblit to take the witness stand and admit that he did the killing and that I would try this Brady case before the Jury first and it would save him from the gas chamber. The Court trying a second case of Boblit would be very apt to give Boblit the same sentence and I would see it in a number of those cases tried that whatever happened in the first usually happened in the second.

(Mr. Bamberger) I have no further questions.

CROSS EXAMINATION

By Mr. Duvall:

1. And it was your strategy that Brady claimed that Boblit struck Brooks over the head and also manually strangled him with a shirt? A. That's right.

2. And you have that knowledge at the time you had a conference with Messrs. Strauss and Turk? A. Oh yes.

3. That was prior to the time that we had that conference in Judge Michaelson's chambers, isn't it? A. Oh yes, that was—

4. Alright, just answer my question, please. Now at that time your strategy was to try Brady before a jury on the evidence that he did not—but Boblit was the one who struck Brooks over the head and strangled him in the hopes that the jury would bring in first degree without capital punishment as far as Brady was concerned? A. That's correct.

5. And Boblit make a defense of that in Boblit's trial before the Court, is that correct? A. Absolutely, that's correct.

6. Alright, now going back to the time that you visited my office, are you positive that you asked to see Boblit's [fol. 31] statements? A. Oh, yes, I wanted to see his statements for this reason—

7. Alright, now just answer my question, please.

(Mr. Bamberger) Now, Your Honor, I think Mr. Woelfel ought to be entitled to give a complete answer.

(Mr. Duvall) He can give it.

(Court) He can explain his answers if he wants to.

(Witness) I was looking for exactly whether there was anything in there where Boblit had said he had done the killing or whether anything was in Brady's statement that said that he did the killing. Then I found so many discrepancies in Boblit's confession and Brady here had made some discrepancies too, however, he came back voluntarily to stand trial. And various phases of the case lead me to believe that this boy wasn't the one who did the killing.

By Mr. Duvall:

8. Do you remember me taking the position that as counsel for Brady you were not entitled to see Boblit's statement? A. No, I don't recall sir.

9. Are you positive I showed you Boblit's statements or as you say some of Boblit's statements? A. I'm very sure I saw them all except this one that's my recollection. Because what I had in mind was this, if I could have

found a confession of Boblit I intended to summon Boblit and put him on the stand and then if he denied that he had done the killing to use that to contradict him for what good it would have been, I don't know, but that was the purpose of going around that way.

10. You didn't call Boblit as a witness? A. I couldn't call him because Strauss and—

11. Of your conference with Strauss and Turk? A. That's right, they wouldn't agree to it.

12. They wouldn't agree to it? A. They wouldn't agree to let him say he did it and furthermore I had no [fol. 32] evidence that he did do it other than what Brady had made his confession, or bringing it face to face by hearing him say that Brady did it.

(Mr. Duvall) I have no further questions.

MAXWELL FRYE, a witness of lawful age having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

34. Then on July 9th you took a statement from Boblit, is that right? A. One was taken from Brady on July 9th, also.

35. Well, which one was taken first? A. The one from Brady.

36. What time was that taken? A. Interrogation started 10:30 A.M. and we completed at 1:40 P.M. He wrote until 2:39 P.M. and then signed it.

37. Excuse me sir, that was ten what? A.M.? A. 10:30 A.M.

38. And what time did he sign it? A. At 2:38 P.M.

39. Now, on that same day you took a statement from Boblit, didn't you? A. That's right.

40. What time did you start that? A. 2:45 P.M.

41. So that was immediately after you finished taking a statement from Brady? A. That's correct.

42. What was the purpose of taking this statement from Boblit? This fifth statement now you've already taken four from him, correct? A. That's correct.

43. What's the purpose of taking the fifth statement? A. There were differences in of—to who may have partici- [fol. 33] pated in various ways. We questioned him again and took the fifth statement.

44. And as you said Boblit's trial was to see who told the truth, isn't that right? A. I don't recall whether I said that or not.

45. Well, wasn't that the purpose? A. Could have been, yes sir.

46. Now, was there any source—did you have any reason to doubt what Boblit had told you in these four statements other than the statement that you had taken from Brady? A. Several statements were taken from him—

47. From whom, sir? A. From Boblit and on each occasion something more was learned. The fifth statement was taken and at that time, as I recall, he had admitted what he had actually done in the case.

48. How long have you been in the police department, sir? A. A little over ten years.

49. And how long have you been in the detective bureau? A. Since 1956. November.

50. How much experience have you had in taking statements from persons accused of crimes? A. Since I went into the detective bureau I had occasion to take quite a few.

51. Well, you say you took these four statements from Boblit and each time you learned a little more? A. Yes, sir.

52. Was that one of the reasons that you went back to take the fifth statement from him? A. It's a normal practice that after one defendant is questioned and we get a statement or obtain a statement either verbally or in writing, typewritten, then we question the other defendant or how many others it may be and any number of times you have to go back to the original one you questioned and obtain another statement if they're willing to give one. [fol. 34] But did you have any reason to believe that Boblit had not yet told you the whole truth in the four

statements? A. There were some doubt but as exactly why we took the fifth statement now at this time I couldn't say I don't have copies of it and I don't recall what's on them.

54. But after you took the fifth statement, that's on July 9, now that's the last time you interrogated Boblit, wasn't it? A. That's correct.

55. And you didn't go back to interrogate—did you interrogate Brady again after you took the July 9th statement from Boblit? A. No, sir.

56. So the July 9th statement was the last interrogation of either defendant, is that correct? A. That's correct.

57. Boblit refused to sign the July 9th statement, didn't he? A. That's correct.

58. Let's go back again to the beginning of that statement. Do you have a copy of that, sir? A. No, I haven't.

59. I show you a photostatic copy of it. Before you took that statement did you tell Boblit why you were—you thought it necessary to take the fifth statement from him? A. As I recall he was told that we would like to take another statement from him. At that time he knew that Brady had been returned to the State and was in custody and our exact reasons before we started I don't recall advising him that we thought there was some doubt in what he said, I don't recall.

60. Did you tell Boblit what Brady had said? A. No, sir, we—not that I can recall I don't think that was done at all.

61. Did you tell Boblit just where the discrepancies were—did you direct his attention to the fact that discrepancies with respect to who had done the acts of violence? A. This statement, if I'm permitted to read it I may recall something that occurred. This statement are things that we wanted to know to bring the case to a conclusion he was asked the questions that were important.

* * * *

[fol. 35] (Witness reads the statement.)

64. Now, officer it's obvious from that statement there are two things that are concerned about that are the discrepancies which of the two defendants had hit Mr.

Brooks on the head and strangled him. Do you recall whether before you began typing the questions that you asked Boblit that you told him that's what you wanted to question him about? A. I don't recall our telling him that that was what we wanted to question him about. He knew at the time that Brady was in custody in the same building. I don't recall whether he'd seen him or not.

65. And in the one question where it says evidence has been uncovered in the case, you might possibly have a few discrepancies? A. I think that was mentioned to him and before he said "here's to" he decided we knew what it was all about and exactly what was taken so he answered the questions we asked.

* * * *

By Mr. Bamberger:

72. Well sir, alright. Do you have any knowledge, officer, when that statement or any copy of it was first furnished to the office of the prosecutor? A. As I recall, Capt. Wellham and myself, possibly Sergeant Kiessling delivered the entire folder to Mr. Duvall. The date I can't recall exactly but it was a short time after July 9th or 10th.

73. Did that folder include the original or a copy of the July 9th statement? A. Copies, the originals are kept on file at headquarters.

* * * *

84. So that sometime between July 9 and 23rd you had given the statement of Boblit of July 9 to Mr. Duvall, is that correct? A. That's correct.

* * * *

[fol. 36] GEORGE W. WELLHAM, a witness of lawful age having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

30. Now, when did you first have any contact with the other defendant, John Brady? A. The first contact was on July 9th.

31. And where was that? A. At the Ferndale Police Station.

32. And who was present? A. Sgt. Frye and Corporal Kiessling.

33. And was that when a statement was taken from Brady? A. Yes, sir.

34. And then after that you were present with the statement was taken from Boblit on July 9th, weren't you? A. Yes, sir.

35. Why was it necessary—or why was the decision made to take another statement from Boblit when you already had four statements from him? A. Well at the time that was our first contact—my first contact with Brady on the ninth. Prior to that Boblit had made certain statements and in questioning Brady certain things had to be determined. Boblit was requestioned.

36. You mean as a result of questioning Brady there were certain discrepancies with the story that Boblit had told you? A. That's correct sir.

* * * *

42. Now, this was taken did you ever participate in a conference with the State's Attorney or his assistant with respect to the investigation of this case in preparation of trial? A. As I recall, this has been sometime ago, but as I recall as we do in all cases we send to the State's Attorney's office a copy of everything that we have at our station pertaining to the case. On a case of this type, we [fol. 37] were constantly in contact with and he was advised of all the situation as it was.

* * * *

JOHN LEO BRADY, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. Now John, when did you first know that Charles Donald Boblit had made a statement to the police dated July 9, 1958 that he was the one who struck Mr. Brooks on the head and later strangled him? A. That was when I was in the Maryland Penitentiary.

3. Was that before or after the trial? A. That was after the trial.

4. Was that before or after you were sentenced? A. That was after I was sentenced.

5. Was it before or after your conviction had been affirmed by the Court of Appeals? A. I couldn't say whether it was before or after, I'm not too sure of that.

6. Had anybody ever told you before that Charles Boblit had admitted that he struck Mr. Brooks and strangled him? A. No, sir.

C. OSBORNE DUVALL, a witness of lawful age, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Bamberger:

* * * *

2. Mr. Duvall are you the State's Attorney for Anne Arundel County? A. I am.

[fol. 38] 3. How long have you occupied that office? A. Since February 1, 1953.

4. Who was your assistant during the—from June 1958 until the conclusion of the trial of John Boblit? A. John Brady or Donald Boblit?

5. Donald Boblit. A. Clarence L. Johnson.

6. And I understand Mr. Johnson is now deceased? A. He is.

* * * *

9. Now, did you participate in any way in the investigation? A. No, not in the sense that I was in the field. I was kept advised by—usually by Captain Wellham or one of the other officers as to what the developments were as they occurred.

10. When were you first advised that Boblit had stated that he was the person who had struck Mr. Brooks on the head and strangled him? A. That was sometime after the statement of July 9 was taken from Boblit and before the file, which I receive, was delivered by the police to my office. I don't know the date.

11. Do you have any correspondence which would show when that file was delivered or transmitted by a letter? A. I don't know, I'll take a look. My recollection is—well, let me say this, it's customary on cases that get this voluminous by the police that they deliver it by hand rather than send it through the mail but I'll see what I've got. No, I do not have a letter of transmittal from the police department and I believe that it was handled Hand Delivery.

12. Well, did you have it prior to the arraignment of Brady? A. Yes.

13. And that, of course, was prior— A. Now, by arraignment, you mean Circuit Court arraignment?

14. Yes, sir, certainly. Was that prior to the Grand Jury proceeding? A. That was prior to the indictment by Grand Jury, yes, he wouldn't be arraigned up until he was indicted.

[fol. 39] 15. Well, then did you ever have the other four statements of Boblit, the prior four statements? A. Yes.

16. Do you then also have the statements of John Brady? A. Yes, sir.

17. Did you ever prior to the trial of John Brady inform him or his attorney of the existence of this statement by Donald Boblit dated July 9? A. No and may I explain my answer.

* * * *

16. As I understand your last answer, you did not before Brady's trial tell him or his counsel of the existence of this statement by Boblit of July 9th? A. That's correct.

17. Now, did you tell either of them of its existence before Brady was sentenced? A. No.

18. Or before his conviction was affirmed by the Court of Appeals? A. Nope.

19. Now, was there ever a conference between counsel for Brady and counsel for Boblit in which you participated prior to the trial of Brady? A. One conference in Judge Michaelsen's chambers.

20. What was the purpose of that conference? A. The purpose of that conference was to have the counsel for each defendant elect their mode of trial, schedule trial dates and that was the prime purpose of those two meetings. In course of that, if, I may say again, if I go further than you want me to stop and I'll—

21. Well, at that time Mr. Woelfel elected a trial by jury for Mr. Brady, is that correct? A. Right. On the assumption of a statement by Mr. Woelfel that Brady's contention was—his contention in his trial was Boblit and not he was the one who had struck the decedent with the shot gun and had strangled the decedent the—

22. Now, why did you get that idea that it was Mr. Woelfel's strategy in this discussion in Judge Michaelson's [fol. 40] chambers, was that a statment by Mr. Woelfel? A. I wouldn't testify that that was a statement by Mr. Woelfel, no.

23. Well, how you get the idea that it was Woelfel's strategy without him having said it? A. Well, I believe he did say it but I can't swear that he said it. I'm not prepared to swear that he said it.

24. At least at that time you had a perfectly clear impression that the defense that would be presented by Brady was that Boblit was the person who had hit Brooks on the head and strangled him, is that clear? A. That was Brady's contention—to be Brady's contention at his trial and was.

25. And that was the—you knew for certain that that was to be his contention at this conference before Judge Michaelson? A. That was certainly my impression.

26. When was that with respect to the trial? A. At least two weeks and possibly longer because I had to make arrangements to have F.B.I. agents up from Miami and I think I asked for a conference well in advance to the

trial so that the trial dates would be firmed out and we wouldn't have any postponements.

(Mr. Bamberger) You may cross examine yourself, Mr. Duvall.

CROSS EXAMINATION

By Mr. Duvall:

In view of Mr. Woelfel's testimony this morning, my recollection is that Mr. Woelfel came to my office and asked to see the statements of Brady and of Boblit. And that I showed him the statements of Brady, which I had in my possession, and declined to, and never did, show him any statements I had of Boblit. I took the position—I have a recollection of a discussion with Mr. Woelfel that I did not feel under the rules that existed then and exist now, that the proposed Discovery Rules—that the counsel for one defendant could as a matter of law obtain statements in possession of the State which emanated from a co-defendant, whom the attorney did [fol. 41] not represent. I am prepared to say that I did not show to Mr. Woelfel any of Boblit's statements.

(Court) You said—what is that last statement?

(Witness) I am prepared to say that I did not show Mr. Woelfel Boblit's statements. I recall that Mr. Woelfel, as he testified this morning, did come back a second time to look at Brady's statements and further examine the statements taken by Agents in Miami as well as the statement taken by Anne Arundel County Police. They were lengthy statements that Brady gave in each instance, and Mr. Woelfel was in my office one day. They were made available to him and he returned either the following day or two days later and asked to see them again and they were made available to him.

REDIRECT EXAMINATION

By Mr. Bamberger:

1. Your recollection is perfectly clear that you agreed with Mr. Woelfel that he did ask you for Boblit's statements? A. Yes.

2. Was that after the conference in Judge Michaelson's office? A. No, that was before.

3. Was it very long before? A. I don't know. It seems — I don't — depends on when Mr. Woelfel was retained to represent Brady. My recollection was that he came in the office and said I've been retained by Brady's family to represent him and I'd like to see what you've got on Brady's statements and Boblit's, F.B.I. reports and autopsy report.

4. Did he ever renew that request? A. No, sir.

5. That request was made orally? A. Yes, sir. And I think the record should show in fairness to Mr. Woelfel that it's been the practice in this County that defense attorneys come to the State's Attorneys office and ask orally for what information they want. They do not go [fol. 42] through the formality of filing a petition with the Court unless in one instance I know it was done by counsel who were not members of the Anne Arundel County Bar and I suppose didn't know our practice.

6. At the time you had Mr. Woelfel asking for these statements did you then have in your possession the statements that Boblit had given including the statement of July 9? A. Yes.

7. Did you know what was the substance of the statement of July 9 then? A. Yes.

* * * *

EXTRAJUDICIAL STATEMENT OF CHARLES D. BOBLIT

July 9, 1958

I, Charles Donald Boblit make the following statement to Captain George W. Wellham, Sgt. Maxwell V. Frye, Jr. and Cpl. Bernard Kiessling who have identified themselves as members of the Anne Arundel County Police Department. Capt. Wellham, Sgt. Frye and Cpl. Kiessling have advised me that I do not have to make this statement and I know that any statement I make can be used against me in a court of law. No force, threats or promises have been made to get me to make this statement. I have been advised that I might be represented by a lawyer at any time.

Q. What is your full name? A. Charles Donald Boblit.

Q. Charles, you are the same Charles Donald Boblit who was arraigned before Mag. Delaba (sic) on July 3, 1958, at 10:00 A.M., at which time the crime you are charged with was read to you, is that correct? A. Yes.

Q. Charles, since you gave your last statement to us, certain evidence has been uncovered that indicates you might possibly have a few discrepancies in your previous statements. At this time we would like to ask you a few more questions to clear these up, is that satisfactory with you? A. Yes.

[fol. 43] Q. In previous statements you have indicated that John Leo Brady struck William Brooks in the head with the shot gun, is that correct? A. Yes.

Q. We would like to ask you at this time if John Leo Brady struck Mr. Brooks with the shot gun or did you? A. I did.

Q. Did you strike Mr. Brooks with the shot gun on the drive way to his home which is located at Hidden Village, Quarterfield Rd., Severn, Md. A. I don't know if it is hidden village or not but it was near Quarterfield Rd.

Q. Where was John Leo Brady when you struck Mr. Brooks? A. Standing off on the side of the road.

Q. This took place on June 27, 1958, is that correct? A. That is correct.

Q. Do you know what time this took place? A. It was about 12:30 or 12:45 that night.

Q. If it happened at 12:30 or 12:45 A.M. it would have been June 28, 1958, is that correct? A. That's correct.

Q. Also after you and John Leo Brady took Mr. Brooks in his car to where his body was later found, you indicated in your previous statements that John Leo Brady strangled Mr. Brooks with your shirt, is that correct? A. That's what I told you, yes.

Q. Do you wish to change this part of your statement? A. Yes.

Q. What did occur at the scene of the strangulation? A. Well he had the gun until then, no I had the gun. I had the gun and the shirt. Then he took the gun from me, that was after I said I would have to shot (sic) him. Brady said no, let's strangle him. That's when I took and twisted my shirt sleeve and choked him. Then we carried him back into the woods.

Q. Why did you tell Brady you would have to shot (sic) Mr. Brooks? A. Well that was right after Brady and I decided he would have to be killed.

[fol. 44] Q. Did you know Mr. Brooks? A. No, sir, I never saw him before in my life.

Q. Were you wearing the shirt, and take it off to strangle Mr. Brooks? A. No.

Q. Where was the shirt? A. Well when we were going down in the car the shirt was over the pistol.

Q. Where was the pistol? A. I had it in my hand.

Q. Did you choke Mr. Brooks while he was standing or did you knock him down and then choke him? A. I put the shirt around his neck while he was standing.

Q. Did you choke him until he fell or did you knock him down before you started choking him? A. I started choking him, he fell by himself.

Q. Charles, why didn't you tell us these things before? A. I don't know.

Q. Charles, since you struck Mr. Brooks in the head and also strangled him, could it be possible that you planned to rob Mr. Brooks and not Brady? A. No sir, I

didn't even know the man. It was his idea to hold him up and not mine and it was his idea to strangle him, I wanted to shot (sic) him.

Q. Is there anything else that is incorrect in your previous statements that you would like to correct at this time? A. Not as I know of.

Q. Is there anything else you would like to add to this statement? A. No.

Q. Is this statement true and correct to the best of your knowledge? A. It is.

Q. Will you sign this statement? A. Not before I see a lawyer.

Q. This entire statement of two pages will now be read to you, if it is correct will you answer by saying yes and then if you care to, you may sign this statement is that understood? A. Yes.

[fol. 45] Q. Is this statement the same as you answered us, or is there any errors that have been found while it was read to you? A. That's the way I gave it.

Q. Would you care to sign this statement? A. No.

Signed: .....
CHARLES DONALD BOBLIT

Witnessed:

/s/ CPL. BERNARD KIESSLING

Witnessed:

/s/ CAPT. GEORGE WELLHAM

/s/ SGT. MAXWELL V. FRYE, JR.

[fol. 45A]

* * * *

COURT'S INSTRUCTIONS TO JURY AT TRIAL OF CASE

Mr. Foreman and Members of the Jury, all the evidence is in in this case and counsel have argued both for the State and for this defendant the facts and the law applicable to the facts in the case. However, this being a criminal case, under our constitution and laws, the Jury are the judges of both the law and the facts. And the Court feels that even though there has been a confession by counsel for the defendant that this traverser is guilty of murder in the first degree without capital punishment, the Court feels that the Jury in order to properly evaluate the entire case should be given advisory instructions as to the law applicable to cases in which the indictment charges the crime of murder. The indictment in this case states as follows: "The Jurors of the State of Maryland for the body of Anne Arundel County do on their oath present that Charles D. Boblit and John L. Brady late of said county on or about twenty-eighth day of June in the year of our Lord nineteen hundred and fifty-eight at the county aforesaid feloniously, wilfully, and of deliberately premeditated malice aforethought did kill and murder William Brooks." The defendant in this case, John L. Brady, entered a plea of not guilty and elected to have his case tried by a jury.

The Court's comments in this case are advisory only, gentlemen of the jury, and in the final analysis the jury are the judges of both the law and the facts, and the verdict in this case is entirely the jury's responsibility. [fol. 45B] In dealing with the crime of murder every murder, or what we refer to as felonious homocide, is presumed to be murder in the second degree. And it is the burden of the State to prove and establish to the jury's satisfaction such facts and circumstances that would justify the jury in raising that charge from murder in the second degree to murder in the first degree. In Maryland murder is divided into two categories, murder in the first degree and murder in the second degree. There's

also another class of felonious homocide called manslaughter, which is not murder but a killing without malice.

Murder in the first degree, in order to establish that the State must prove to you beyond any reasonable doubt that the crime committed was wilful, deliberate and premeditated. It was done with the intention to inflict serious bodily harm and that death resulted from that intention. Malice does not mean necessarily hatred or ill-will, it simply means a wrongful intention to do serious bodily harm or to take human life without legal justification or excuse. Wherever there is murder there is malice. Aforethought simply means that the intention or design to take human life or to commit serious bodily harm to an individual existed prior to or at the time that the act resulting in the death of murder existed. The distinction between murder in the first degree and murder in the second degree can best be defined in this manner: murder in the first degree inspires a little bit of time, what we call premeditation, time to think about it, the act which [fol. 45C] is to be committed and not the killing on the spur of the moment or suddenly. Where the killing is on the spur of the moment or suddenly without any deliberation or premeditation or thinking about it in order to have the opportunity to make up one's mind over a little period of time, the law doesn't classify or indicate any specific period of time, that killing would be murder in the second degree because there would be no wilful, deliberate, premeditated killing. The other class of killing, which the Court has just referred, felonious homocide, in which there is no malice, that is, a killing results where there is no intention to take human life, either done in the heat of passion, suddenly without any intention, probably in a fight or in some altercation in which unfortunately some one is injured and death results there from. But the distinction between murder and malice is, specifically, that wherever there's murder there is malice, wherever there is manslaughter there is an absence of malice. And as the Court defined it a few moments ago, malice means the wrongful intention, scheme, plan or design to inflict serious bodily harm resulting in death without any legal

justification or excuse. In this case we have other circumstances to which the STATE'S ATTORNEY referred in reading the statute applicable thereto. And the statute provides that where, if the jury finds, there is a perpetration of the crime of robbery and as a result of the perpetration of that crime the circumstances are so inter-related or linked together that there was a killing resulting [fol. 45D] from that robbery, the Jury would have a right under the statute to bring in a verdict of murder in the first degree. Correspondingly, there is some testimony in this case which the jury may consider and the State's Attorney read that relating to the law relative to killing or murder in the mannor of poison or lying in wait. The Jury should take into consideration in its determination as to the degree of offense in this case, the circumstances surrounding the placing of the log in this road and the related details as narrated in the evidence presented.

In this case anyone of five verdicts may be rendered by the Jury. The Court has written them out on a piece of paper in order that the Jury may have them available after you've deliberated and arrived at a verdict. The first, the Jury may bring in a verdict of guilty of murder in the first degree, if that is the verdict of the jury then it's duty of the Court to determine the sentence which may be imposed, and under our law the sentence will either be the sentence of death by confinement in the gas chamber, that having superseded the earlier method of punishment by hanging, or life imprisonment in the Maryland Penetentiary. The second possible verdict is guilty of murder in the first degree without capital punishment, under that verdict automatically the Court is required by law to impose the penalty of confinement in the Maryland Penetentiary for the period of the natural life of the person found guilty of murder of first degree without capital punishment. The third, is not guilty of murder in the first degree but guilty [fol. 45E] of murder in the second degree, under that verdict the Court would be required to impose the penalty not to exceed eighteen years. Under No. 4, the Jury may bring in a verdict of not guilty of murder but guilty of manslaughter, the maximum penalty that may be imposed

in that case would be ten years. And fifth, the verdict, if the Jury so finds that the defendant is not guilty.

Gentlemen, that concludes the Court's instructions, in view of the concession of counsel for defense. If there are no exceptions then swear the bailiff.

Gentlemen of the Jury, in view of the fact that it's close to lunch time, Court feels that perhaps it would be better that the Sheriff take you to lunch and return as soon as you can, perhaps at 1 o'clock, and then continue your deliberation and endeavor to reach a verdict.

Sheriff, take charge of this Jury and keep them together, take them to lunch and return them here not later than 1 o'clock. Court will take a recess 'til 1 o'clock.

[fol. 46]

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1961

No. 135

JOHN L. BRADY

v.

STATE OF MARYLAND

Brune, C. J.,
Henderson,
Prescott,
Horney,
Marbury,
JJ.

OPINION BY BRUNE, C. J.—October 11, 1961

[fol. 47] On this appeal from a denial of post conviction relief, the appellant, Brady, contends that he was deprived of a fair trial by reason of the fact that the State did not disclose at or before the trial that it then had in its possession a statement of his accomplice Boblit admitting that he, Boblit, had actually strangled the victim.

Boblit and Brady were each convicted of first degree murder in separate trials. Brady elected a jury trial and was tried first; Boblit elected a court trial. Each appealed from his conviction and the cases were argued together in this Court, and each of the convictions was affirmed on appeal, *sub nom. Boblit* v. *State*, 220 Md. 454, 154 A. 2d 434. It was conceded that Boblit conspired with Brady

to rob the victim, Brooks, but each claimed that the other had actually strangled Brooks and that the killing was separate and distinct from the robbery. We held otherwise, pointing out that the robbery was not complete at the time Brooks was killed, although Boblit contended on appeal that he did not actively assist Brady in strangling the victim. The sole contention raised on behalf of Brady related to the voluntariness of his confession, in which he admitted participation but denied killing Brooks, although, as pointed out in the opinion, he took the stand and admitted virtually everything set forth in his confession. On this appeal, Brady concedes that "[a]t his trial the appellant [Brady] admitted participation in the robbery in the course of which the homocide occurred." As we held [fol. 48] on the original appeals of Boblit and Brady, the killing was clearly in perpetration of the robbery and hence covered by the statute, Code (1957), Art. 27, Sec. 410, which defines such a killing as murder in the first degree.

Brady subsequently filed a motion to set aside the judgment and sentence on the ground that an unsigned statement given to the police by Boblit, of which he claims he had no knowledge until after the affirmance on his appeal, although it was produced at the trial of Boblit, would have corroborated his testimony that Boblit did the actual killing. We dismissed his appeal from the denial of that motion on the ground that his only relief was under the Post Conviction Act, Code (1960 Supp.), Art. 27, Sec. 645A, *et seq.* *Brady* v. *State*, 222 Md. 442, 160 A. 2d 912.

Brady then applied for post conviction relief, and his application was denied after a full hearing, his application being on substantially the same grounds. The trial court filed an elaborate opinion holding that there had been no denial of a constitutional right. We granted leave to appeal. Md. , A. 2d

At the trial of Boblit the State offered the unsigned statement of Boblit in which he admitted strangling the victim. The court excluded it because it was unsigned.[1]

[1] See *Hall* v. *State*, 223 Md. 158, 162 A. 2d 751, decided after the trial of Boblit's case and reaching an opposite result.

In several prior statements Boblit had stated that Brady did the killing and so testified on the stand. These state- [fol. 49] ments were made available to Brady's counsel before trial, but the one in which Boblit said that he had done the actual killing was not so made available. At the trial of Brady the unsigned statement of Boblit was not produced by the State nor offered in evidence. This trial, as noted, took place before the trial of Boblit. The State knew in advance of Brady's trial that Brady's chief reliance was upon the hope that the jury might find him guilty of first degree murder without capital punishment if it believed his testimony that Boblit did the killing. The importance of this consideration was stressed in the case of *Day* v. *State*, 196 Md. 384, 391, 76 A. 2d 729. See also *United States ex rel. Almeida* v. *Baldi*, 195 F. 2d 815 (3d Cir.), cert. den., 345 U.S. 904; rehearing den., 345 U.S. 946; *United States ex rel. Thompson* v. *Dye*, 221 F. 2d 763 (3d Cir.), cert. den. 350 U.S. 875.

We think that there was a duty on the State to produce the confession of Boblit that he did the actual strangling or at least to inform counsel for the accused of its existence. The suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process. See *People* v. *Fisher*, 192 N.Y.S. 2d 741, 746 (Ct. Gen. Sess. N.Y. Co.); *United States ex rel. Almeida* v. *Baldi, supra; United States ex rel. Thompson* v. *Dye, supra; Griffin* v. *United States*, 87 U.S. App. D.C. 172, 183 F. 2d 990. For cases involving the related problem of the prosecution's failing to correct testimony known to be untrue, and holding such failure and the use of such testimony to amount to a denial of due process, [fol. 50] see *Alcorta* v. *Texas*, 355 U.S. 28; *Napue* v. *Illinois*, 360 U.S. 264; *People* v. *Savvides*, 1 N.Y. 2d 554, 136 N.E. 2d 853 (non-disclosure and failure to correct untrue testimony as denying a fair trial). It is none the less a denial of due process if the withholding of material evidence is without guile (*Griffin* v. *United States*; *People* v. *Savvides;* both just cited) but it seems fair to add, that the appellant here does not contend that failure to produce Boblit's statement in issue was the result of guile.

The State contends that Boblit's confession of the actual strangling would not have been admissible at Brady's trial and hence that its being withheld could not have prejudiced Brady's case. It is true that as a general rule an extrajudicial confession or admission by a third party that he committed the offense for which the defendant is on trial is not admissible. *Muashower* v. *State*, 55 Md. 11; *Bachr* v. *State*, 136 Md. 128, 110 A. 103; and this has been recognized in *Brennan* v. *State*, 151 Md. 265, 134 A. 148, and in *Thomas* v. *State*, 186 Md. 446, 47 A. 2d 43. This general rule, which is the majority rule in this country as well as the rule in England, has been severely criticized, notably in Mr. Justice Holmes' brief and pointed dissent in *Donnelly* v. *United States*, 228 U.S. 243, at 277-278, and in 5 Wigmore, *Evidence* (3rd ed.) §§ 1476, 1477, and McCormick, *Evidence*, § 255. The A.L.I. *Model Code of Evidence*, § 509, rejects it.

Both the *Brennan* and the *Thomas* cases recognized that the rule is not without exception and have limited its operation. It has also been at least limited, so as not [fol. 51] to be an absolute rule, in some other jurisdictions. *Hines* v. *Commonwealth*, 136 Va. 728, 117 S.E. 843; *Newberry* v. *Commonwealth*, 191 Va. 445, 460-462, 61 S.E. 2d 318, 325-326 (co-defendant's confession exculpating defendant); *Sutter* v. *Easterly*, 354 Mo. 282, 189 S.W. 2d 284; *Osborne* v. *Purdome*, 250 S.W. 2d 159 (Mo.), (following the *Sutter* case after an intervening case in which *Sutter* had not been applied, *State* v. *Gordon*, 356 Mo. 1010, 204 S.W. 2d 713); *People* v. *Lettrich*, 413 Ill. 172, 108 N.E. 2d 488; *Cameron* v. *State*, 153 Tex. Cr. Rep. 29, 217 S.W. 2d 23. Some cases emphasize the unavailability of the declarant as a witness, and in *Newberry* v. *Commonwealth*, *supra*, his refusal to testify was held to amount to unavailability.

In *Thomas* v. *State*, *supra*, 186 Md. at 452, Judge Delaplaine, speaking for the Court said: "[W]e hold that where a witness has made a written confession that he committed the crime with which the defendant is charged, the defendant should be allowed to introduce the confession in evidence and question him in regard to the confession and the circumstances under which he made it. We further hold that where in a criminal case an

officer has secured contradictory confessions from two different persons, the defense should be permitted to question him about both confessions and we further hold that such a confession by a third party is admissible unless it appears that there was some collusion in obtaining it." [fol. 52] The reasons for the adoption of the general rule and also for the development of exceptions to it or limitations upon it all rest in large measure upon concern for the trustworthiness of the declaration against interest proposed to be offered; and certainly this weighs heavily in the criticisms of the general rule. See the passages in Wigmore and McCormick above referred to, Mr. Justice Holmes' dissent in *Donnelly* v. *United States*, *supra*; *People* v. *Lettrich*, *supra*, 108 N.E. 2d at 491-492; and the *Brennan* and *Thomas* cases in this Court. Certainly since the decisions of those cases, the rule of the *Munshower* case cannot be said to be of universal application. We think that Boblit's undisclosed confession might have been usable under any of the three rules stated in *Thomas*, which we have quoted above, and hence could not be regarded as inadmissible and unusable in any manner in Brady's defense.

Brady might have called Boblit as a witness. If he had testified, the first holding of *Thomas* would have permitted his cross-examination about that confession. The only difference then would have been that this confession of Boblit's was unsigned and hence not strictly a written confession; but under *Hall* v. *State*, 223 Md. 158, 162 A. 2d 751, that difference would not seem controlling. If, as might well have been the case, Boblit had stood on his privilege and refused to testify, Brady might then have interrogated the police officers who had taken Boblit's statement; and it seems that there was no collusion as between Boblit and Brady with regard to this confession. Their interests were opposed to the extent that [fol. 53] the question of which one did the actual strangling was material, their interrogations were separate and it appears that they had been kept apart. No reason or inducement for Boblit to take this blame for Brady is apparent. To what extent a confession or admission of a third party is free of collusion and bears the indicia of trustworthiness is a question which we think should be

entrusted in the first instance to the sound discretion of the trial judge. Certainly, the "confession" of a crackpot, anonymous or otherwise (and such "confessions" are not uncommon in cases of wide notoriety), would not bear any hallmark of trustworthiness, and would not call for the application of the second or third rules of the *Thomas* case.

There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. To apply the words of the Supreme Court of the United States in *Griffin* v. *United States*, 336 U.S. 704 at 708-709, quoted by the Court of Appeals of the District of [fol. 54] Columbia Circuit in its opinion on remand of the case, above cited (183 F. 2d at 992), it seems to us (as it did to the Court of Appeals of the District in *Griffin*) that it would be "too dogmatic" for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.

Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. Having arrived at the conclusions that it was prejudicial and that he was deprived of a constitutional right, we turn to the question of appropriate relief under the Uniform Post Conviction Procedure Act (Code (1960, Cum. Supp.), Art. 27, Secs. 645A-645J). The section dealing with the kind of relief to be granted is Sec. 645G, which reads in part as follows: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to * * * retrial, * * * correction of sentence, or other matters that may be necessary and

proper." Our own Rule 870 (of the Maryland Rules) provides that this Court will (with exceptions not here pertinent) affirm or reverse the judgment appealed from, or direct the manner in which it shall be modified, changed or amended.

The appellant's sole claim of prejudice goes to the punishment imposed. If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first de- [fol. 55] gree. We, therefore, see no occasion to retry that issue. Brady is entitled to have a jury empaneled to determine whether the finding already made of guilty of murder in the first degree should or should not be modified by the addition of the words "without capital punishment"; and to that end any admissible evidence bearing on that question should be submitted to the jury which either the State or the defendant may deem it appropriate to present. This may require to a large extent a duplication of the evidence submitted at the first trial, and it will permit the defendant to make such use of the withheld Boblit confession as he may desire and as may be appropriate under our decision in this case. We do not now undertake to pass upon any question of privilege, should Boblit be called as a witness and should he assert any claim of privilege against testifying. Should the jury decline to add the words "without capital punishment", sentence will be for the determination of the court on the basis of the evidence produced on the rehearing. If the jury should add those words, life imprisonment is mandatory under Code (1957), Art. 27, Sec. 413.

In accordance with the above views the judgment appealed from is reversed and the case is remanded with instructions to enter an order, not inconsistent with this opinion, for a new trial on the question of punishment only.

Judgment Reversed and Case Remanded for the Entry of an Order Not Inconsistent With This Opinion for a New Trial on the Question of Punishment Only.

[fol. 56]

IN THE COURT OF APPEALS OF MARYLAND

No. 135, September Term, 1961

JOHN L. BRADY

v.

STATE OF MARYLAND

Appeal from the Circuit Court for Anne Arundel County. (Transferred from Post Conviction Application No. 9—1961 Term)

Filed: July 7, 1961.

October 11, 1961: Judgment reversed and case remanded for the entry of an order not inconsistent with this opinion for a new trial on the question of punishment only. Op. Brune, C. J.

MANDATE

STATEMENT OF COSTS

In Circuit Court:

Record
Stenographer's Costs

In Court of Appeals:

Filing Record on Appeal	
Printing Brief for Appellant	$362.45
Reply Brief	
Portion of Record Extract—Appellant	
Appearance Fee—Appellant	10.00
Printing Brief for Appellee	94.55
Portion of Record Extract—Appellee	
Appearance Fee—Appellee	10.00

STATE OF MARYLAND, Set:

I do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this tenth day of November A. D. 1961.

/s/ J. Lloyd Young
Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and *NOT THROUGH THIS OFFICE*

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 58]

SUPREME COURT OF THE UNITED STATES

No. , *October Term, 1961.*

JOHN L. BRADY, PETITIONER

vs.

WARDEN OF THE MARYLAND PENITENTARY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 9, 1962

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 9, 1962.

Stewart

/s/ Potter ~~Thurmond~~

Associate Justice of the Supreme Court of the United States.

Dated this 9th day of February 1962.

[fol. 59]

SUPREME COURT OF THE UNITED STATES

No. 47 Misc., October Term, 1962

JOHN L. BRADY, PETITIONER

vs.

MARYLAND

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of the State of Maryland.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 8, 1962

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 490 and placed on the summary calendar.

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

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